Supreme Court, U.S.
FILED
NOV 24 2009
OFFICE OF THE CLERK

No. 09-358

In The
Supreme Court of the United States

MING WEI LIU,

Petitioner,

v.

ROBERT C. BOURGE,

Respondent.

On Petition For Writ Of *Certiorari*
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI*

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

Petitioner seeks *certiorari* solely because he fails to accept the lower courts' factual findings and application of settled law. In his Questions Presented for Review, however, Petitioner asserts that this case involves landmark questions of federal law. It does not.

Respondent submits the following Counter-Statement of Questions Presented to describe appropriately the pedestrian argument for Supreme Court review:

1. Whether the Eleventh Circuit Court of Appeals properly affirmed summary judgment for Respondent finding that Respondent's invocation of Alabama's peer review privilege did not violate the Supremacy Clause of the United States Constitution.

2. Whether the Eleventh Circuit Court of Appeals properly affirmed the District Court's finding that Respondent's refusal to produce peer review materials and publication of the negotiated recommendation letter did not deprive Petitioner of the right to pursue his chosen profession.

THE PARTIES

1. Petitioner Ming Wei Liu ("Dr. Liu" or "Petitioner") is an interventional cardiologist formerly employed as an Associate Professor at the School of Medicine at the University of Alabama at Birmingham.

2. Respondent Robert C. Bourge ("Dr. Bourge" or "Respondent") is the Director of Cardiovascular Disease for the Department of Medicine at the University of Alabama at Birmingham.

3. The Board of Trustees of the University of Alabama, a body corporate, (the legal name, *inter alia*, for UAB) was awarded summary judgment by the District Court. Petitioner did not appeal from that judgment. UAB was not a party in the Eleventh Circuit proceedings and is not named as a party in the pending petition. Some confusion may arise from the Board's appearance in the case caption on the Court's docket.

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OPINIONS BELOW

The District Court's Memorandum Opinion and Order granting summary judgment to Respondent on all of Petitioner's federal claims is unreported and included as Exhibit C in the Appendix to the Petition. Being unremarkable, the Order of the Court of Appeals affirming the District Court's grant of summary judgment to Respondent is also unreported and included as Exhibit A in the Appendix to the Petition. The Court of Appeals' Order denying Petitioner's request for panel rehearing is unreported and is included as Exhibit B in the Appendix to the Petition.

JURISDICTION

The decision of the Eleventh Circuit Court of Appeals to be reviewed was filed May 19, 2009. Panel rehearing was denied on June 23, 2009. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The petition contains the relevant Alabama statutes governing nondisclosure of peer review materials (Pet. 4-5), but omits the relevant portions of the Healthcare Quality Improvement Act. Those provisions, and the relevant regulations, are included as

Exhibit A in the Supplemental Appendix attached to this Brief in Opposition.

STATEMENT OF THE CASE

Dr. Liu's hospital privileges at UAB were summarily suspended because of assertions that he failed to comply with the standard of care. Dr. Liu thereafter chose to resign while under suspension, yielding an automatic report to the National Practitioner Data Bank ("Data Bank"). In seeking subsequent employment in California, Dr. Liu's Data Bank report triggered additional inquiry into the circumstances of his practice in Alabama. Dr. Liu applied to the University of Southern California ("USC") and USC sought additional information, as well as medical records, relevant to the summary suspension of Dr. Liu's privileges. UAB declined to provide medical records, as required by Alabama's Medical Peer Review Privileges, ALA. CODE §§ 6-5-333 and 22-21-8.

USC and Dr. Liu requested an explanatory letter, which UAB provided. The letter was negotiated between counsel for Dr. Liu and counsel for The University of Alabama Health Services Foundation.[1] USC apparently found the letter inadequate to

[1] The University of Alabama Health Services Foundation is a 501(c)(3) non-profit organization operating a group practice at UAB. It has not been a party to this case at any time.

resolve Dr. Liu's pending application and continued to seek medical records. The District Court carefully detailed the facts as reflected in the record upon cross-motions for summary judgment. Pet. Ex. C at 53-78.

On February 28, 2007, Dr. Liu commenced this action against the Board of Trustees of the University of Alabama and Dr. Robert C. Bourge, who was Dr. Lui's supervisor. Dr. Liu claims that the invocation of Alabama's peer review privilege deprived him of substantive and procedural due process rights and that the privilege did not apply in federal court. Following discovery, the parties cross-moved for summary judgment. On December 15, 2008, the District Court granted summary judgment in favor of Defendants Dr. Bourge and UAB on the federal claims and declined supplementary jurisdiction over state law claims purportedly arising under both Alabama and California law.

Dr. Liu appealed to the Eleventh Circuit, which affirmed the District Court in an unpublished *per curiam* Opinion.[2] Next, Liu sought a rehearing before the Panel which was denied on June 23, 2009. His Petition for a Writ of *Certiorari* then followed.

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[2] Pursuant to Eleventh Circuit Rule 36-2, unpublished opinions do not have precedential value.

ARGUMENT

THE PETITION FOR WRIT OF *CERTIORARI* SHOULD BE DENIED

I. The Petition Contains No Basis For Granting the Writ.

Review on a writ of *certiorari* is discretionary and a "petition for a writ of certiorari will be granted only for a compelling reason." Sup. Ct. R. 10. Here, Dr. Liu fails to offer any compelling reason for this Court to grant his Petition for a Writ of *Certiorari*.

Certiorari is unwarranted foremost because there is no conflict among the circuits regarding any of the questions presented. Instead, this matter involves the application of established (and undisputed) legal doctrines to the particular facts of this case. The absence of any circuit split is reason enough to deny the petition.

Second, the form of the Eleventh Circuit's Opinion, *per curiam* and unpublished, confirms that the Opinion has limited precedential value for future litigants. Indeed, the Opinion has uncertain value even as between these parties because UAB was not a party on appeal and is no longer a party to this proceeding. At this juncture, only injunctive relief is sought as against Dr. Bourge.[3]

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[3] As the district court observed: "Even an injunction against Bourge in his official capacity would prove difficult, if not impossible, to enforce if it should mandate that Bourge disgorge

(Continued on following page)

Moreover, this case does not merit *certiorari* because it turns on peculiar and novel facts. First, Dr. Liu's decision to resign while his privileges were suspended was made upon the advice of his own counsel. Rather than complete the "due process" procedures to defend the challenge to his privileges, Dr. Liu elected to forfeit in the forum provided to him.[4] He failed to answer the serious allegations against his practice. Second, Dr. Liu characterizes the recommendation letter as a "back channel" effort to deprive him of the right to practice academic medicine. Pet. at 20. Yet the facts are undisputed that USC and Dr. Liu requested that the recommendation letter be prepared and Dr. Liu's own counsel participated in the letter's preparation and suggested some changes to it, which UAB adopted.

II. The Decision Below is Correct.

The petition for *certiorari* challenges the Eleventh Circuit's affirmation of the District Court's grant of summary judgment for a variety of meritless reasons. In essence, Petitioner quarrels with the lower courts' conclusion that the Alabama peer review statutes do not interfere with the HCQIA and

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peer review materials that are not in his custody or control." Pet. Ex. C at 91-92. There is nothing in the record to suggest that Dr. Bourge controls any of the records at issue.

[4] The irony of Dr. Liu's litigation is that he apparently seeks to defend his practice decisions in California when he had abandoned that option in Alabama.

disagrees with the fact-based determination that Dr. Bourge did not violate Dr. Liu's due process rights by invoking the peer review privilege and refusing to produce peer review materials. As demonstrated below, the Court of Appeals properly affirmed the District Court's decision to grant summary judgment in favor of Dr. Bourge, and thus, Dr. Liu's arguments do not justify issuance of a writ of *certiorari*.

A. The District Court and Court of Appeals Properly Determined That Respondent's Invocation of the Alabama Peer Review Privilege Did Not Violate Petitioner's Rights Under the HCQIA or the Fourteenth Amendment.

Dr. Liu argues that Dr. Bourge violated his rights under the HCQIA and the Fourteenth Amendment by invoking the Alabama peer review privilege, refusing to disclose peer review materials to USC, and sending the recommendation letter instead. Dr. Liu's arguments are unworthy of *certiorari* to this Court.

1. The Courts Below Properly Determined that Nothing in the HCQIA Requires the Disclosure of Peer Review Materials Sought by Petitioner.

Relying on everything but the text of the HCQIA and the regulations interpreting it, Dr. Liu argues that the lower courts incorrectly determined that the

HCQIA does not require the disclosure of peer review materials he seeks. Pet. at 11-28. As explained by the lower courts, Dr. Liu's argument is without merit.

By enacting the HCQIA, Congress established channels for peer review bodies to disseminate information pertaining to physicians' credentials with the primary intent of protecting patients from incompetent physicians relocating from state to state ahead of state licensing authorities. 42 U.S.C. §§ 11101(2), 11137(b)(1); Pet. Ex. A at 42. To achieve this purpose, the HCQIA requires that peer review bodies make certain disclosures to the National Practitioner Data Bank and mandates the confidentiality of such information unless state law provides otherwise. 42 U.S.C. § 11133(a)(3).

The HCQIA requires that peer review bodies report to the Data Bank (1) the name of the physician or practitioner involved in the peer review; (2) a description of the acts or omissions or other reasons for the action or, if known, for the surrender; and (3) such other information regarding the circumstances of the action or surrender as the Secretary deems appropriate. 42 U.S.C. § 11133(a)(3); Pet. Ex. A at 42 n.4. As the Court of Appeals correctly found, "Nothing in the HCQIA mandates that healthcare entities provide peer review information to credentialing authorities in other states in *excess* of the information required to be reported to the NPDB." Pet. Ex. A at 44-45; 45 C.F.R. § 60.9 (2006) (information to be

reported to Data Bank); 45 C.F.R. § 60.10 (2006) (information reported out by Data Bank).[5]

Since the HCQIA does not require the production of the peer review materials Dr. Liu seeks, there logically can be no conflict between the HCQIA and the Alabama peer review statutes, which mandate the confidentiality of peer review materials. ALA. CODE §§ 6-5-333; 22-21-8. Since there is no conflict between the Alabama peer review statutes and the HCQIA, Dr. Bourge's invocation of the peer review statutes does not violate the Supremacy Clause. This issue merits no further consideration by the Court.

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[5] Dr. Liu argues that Dr. Bourge wrongly invoked the Alabama peer review statutes which he claims are "facially inapplicable." Pet. at 13. The Court of Appeals found it unnecessary to decide whether Dr. Bourge's invocation of the Alabama peer review privileges was proper because Dr. Bourge was not required by the HCQIA to produce the peer review materials in the first place. Pet. Ex. A at 44. The District Court rejected Dr. Liu's argument and concluded that Dr. Bourge's invocation of the peer review privilege was proper because the sweeping language in the statutes "demonstrates that the Alabama legislature intended an almost hermetically sealed status for all peer review documents." Pet. Ex. C at 117. Regardless of whether or not Dr. Bourge properly invoked the Alabama peer review statutes, the result is the same – Dr. Bourge's nondisclosure does not violate the Constitution because nothing in the HCQIA or any other law requires the disclosure of peer review materials Dr. Liu seeks.

2. The District Court and Court of Appeals Correctly Found That Dr. Bourge Did Not Violate Dr. Liu's Substantive Due Process Rights.

Dr. Liu disagrees with the lower courts' conclusion that Dr. Bourge did not deprive him of the right to work as a cardiologist or medical educator and seeks a third bite at the apple to prove that Dr. Bourge "unconstitutionally blacklisted" him through "backchannel" communications (which his own legal counsel negotiated on his behalf) of allegedly false information to USC. Pet. at 29-33. As determined by the lower courts, Dr. Bourge obviously did not deprive Dr. Liu of his right to work as a medical educator or cardiologist because Dr. Liu is, in fact, currently working as a medical educator and cardiologist.[6]

This Court has recognized that the liberty component of the Fourteenth Amendment's Due Process Clause includes the right to pursue a profession. *See, e.g.*, *Conn v. Gabbert*, 526 U.S. 286, 291-92 (1999) (stating that there is "some generalized due process right to choose one's field of private employment"). However, in order to prove that he has been deprived

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[6] Dr. Liu originally claimed that he was "blacklisted" from practicing as an interventional cardiologist. He later claimed that he was deprived of the right to practice as a medical educator. Regardless of his claimed profession *du jour*, it is undisputed that Dr. Liu is currently employed as an interventional cardiologist and medical educator at several hospitals in California. Pet. Ex. A at 48; Pet. Ex. C at 121.

of the right to pursue his profession, Dr. Liu must establish that he is completely precluded from practicing as a medical educator or cardiologist. *Id.* at 292 (noting that the cases which recognize violation of this right "all deal with a complete prohibition of the right to engage in a calling, and not a sort of brief interruption"); *Clemons v. Dougherty County, Ga.*, 684 F.3d 1365, 1371 (11th Cir. 1982) (reiterating that in order to prove a deprivation of liberty interest in one's profession, a plaintiff must establish that the state employer made "stigmatizing charges which foreclose his freedom to take advantage of other employment opportunities").

As the District Court and Court of Appeals both properly determined after careful review of the evidence and established law, Dr. Liu's substantive due process claim fails because he is currently working as a medical educator and interventional cardiologist and has been granted staff privileges at several hospitals in California. Pet. Ex. A at 48; Pet. Ex. C at 121. Since he is working as a medical educator and interventional cardiologist, he clearly has not been "blacklisted" and deprived from working in these professions. Moreover, Dr. Liu cannot be heard to complain about the "stigmatizing" effects of the Data Bank report when he knew that UAB would be required to report to the Data Bank that he chose to resign while his privileges were under suspension. Finally, the recommendation letter sent by Dr. Bourge was requested by Dr. Liu and his attorney, who also

negotiated the text of the letter. There is simply no merit to Dr. Liu's due process argument.[7]

CONCLUSION

Petitioner failed to meet his burden to demonstrate a compelling reason why the writ should be granted. Accordingly, the petition should be denied.

Respectfully submitted,

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[7] Alternatively, summary judgment for Dr. Bourge was proper because Dr. Liu's claims are barred by the numerous releases he signed in which he agreed to release UAB and its employees from any and all liability arising from disclosure of information. Although this argument was fully briefed at summary judgment and on appeal, neither the District Court nor the Court of Appeals addressed it in their opinions. The releases provide an independent rationale for affirming the decisions of the lower courts and further illustrate why the petition for *certiorari* should be denied.

SUPPLEMENTAL APPENDIX
Exhibit A

42 U.S.C. § 11101. Findings

The Congress finds the following:

(1) The increasing occurrence of medical malpractice and the need to improve the quality of medical care have become nationwide problems that warrant greater efforts than those that can be undertaken by any individual State.

(2) There is a national need to restrict the ability of incompetent physicians to move from State to State without disclosure or discovery of the physician's previous damaging or incompetent performance.

(3) This nationwide problem can be remedied through effective professional peer review.

(4) The threat of private money damage liability under Federal laws, including treble damage liability under Federal antitrust law, unreasonably discourages physicians from participating in effective professional peer review.

(5) There is an overriding national need to provide incentive and protection for physicians engaging in effective professional peer review.

42 U.S.C. § 11133. Reporting of certain professional review actions taken by health care entities

(a) Reporting by health care entities.

(1) On physicians. Each health care entity which –

(A) takes a professional review action that adversely affects the clinical privileges of a physician for a period longer than 30 days;

(B) accepts the surrender of clinical privileges of a physician –

(i) while the physician is under an investigation by the entity relating to possible incompetence or improper professional conduct, or

(ii) in return for not conducting such an investigation or proceeding; or

(C) in the case of such an entity which is a professional society, takes a professional review action which adversely affects the membership of a physician in the society, shall report to the Board of Medical Examiners, in accordance with section 424(a), the information described in paragraph (3).

* * *

(3) Information to be reported. The information to be reported under this subsection is –

(A) the name of the physician or practitioner involved,

(B) a description of the acts or omissions or other reasons for the action or, if known, for the surrender, and

(C) such other information respecting the circumstances of the action or surrender as the Secretary deems appropriate.

* * *

(c) Sanctions.

(1) Health care entities. A health care entity that fails substantially to meet the requirements of subsection (a)(1) shall lose the protections of section 411(a)(1) if the Secretary publishes the name of the entity under section 411(b).

* * *

45 C.F.R. §60.9 Reporting adverse actions on clinical privileges.

(a) Reporting to the Board of Medical Examiners – (1) Actions that must be reported and to whom the report must be made. Each health care entity must report to the Board of Medical Examiners in the State in which the health care entity is located the following actions:

(i) Any professional review action that adversely affects the clinical privileges of a physician or dentist for a period longer than 30 days;

(ii) Acceptance of the surrender of clinical privileges or any restriction of such privileges by a physician or dentist –

(A) While the physician or dentist is under investigation by the health care entity relating to possible incompetence or improper professional conduct, or

(B) In return for not conducting such an investigation or proceeding; or

(iii) In the case of a health care entity which is a professional society, when it takes a professional review action concerning a physician or dentist.

(2) Voluntary reporting on other health care practitioners. A health care entity may report to the Board of Medical Examiners information as described in paragraph (a)(3) of this section concerning actions

described in paragraph (a)(1) in this section with respect to other health care practitioners.

(3) What information must be reported. The health care entity must report the following information concerning actions described in paragraph (a)(1) of this section with respect to the physician or dentist:

(i) Name,

(ii) Work address,

(iii) Home address, if known,

(iv) Social Security number, if known, and if obtained in accordance with section 7 of the Privacy Act of 1974,

(v) Date of birth,

(vi) Name of each professional school attended and year of graduation,

(vii) For each professional license: the license number, the field of licensure, and the name of the State or Territory in which the license is held,

(viii) Drug Enforcement Administration registration number, if known,

(ix) A description of the acts or omissions or other reasons for privilege loss, or, if known, for surrender,

(x) Action taken, date the action was taken, and effective date of the action, and

(xi) Other information as required by the Secretary from time to time after publication in the Federal Register and after an opportunity for public comment.

(b) Reporting by the Board of Medical Examiners to the National Practitioner Data Bank. Each Board must report, in accordance with Sec. Sec. 60.4 and 60.5, the information reported to it by a health care entity and any known instances of a health care entity's failure to report information as required under paragraph (a)(1) of this section. In addition, each Board must simultaneously report this information to the appropriate State licensing board in the State in which the health care entity is located, if the Board is not such licensing board.

(c) Sanctions – (1) Health care entities. If the Secretary has reason to believe that a health care entity has substantially failed to report information in accordance with Sec. 60.9, the Secretary will conduct an investigation. If the investigation shows that the health care entity has not complied with Sec. 60.9, the Secretary will provide the entity with a written notice describing the noncompliance, giving the health care entity an opportunity to correct the noncompliance, and stating that the entity may request, within 30 days after receipt of such notice, a hearing with respect to the noncompliance. The request for a hearing must contain a statement of the material factual issues in dispute to demonstrate that there is cause for a hearing. These issues must be both substantive and relevant. The hearing will be

held in the Washington, DC, metropolitan area. The Secretary will deny a hearing if:

(i) The request for a hearing is untimely,

(ii) The health care entity does not provide a statement of material factual issues in dispute, or

(iii) The statement of factual issues in dispute is frivolous or inconsequential.

In the event that the Secretary denies a hearing, the Secretary will send a written denial to the health care entity setting forth the reasons for denial. If a hearing is denied, or if as a result of the hearing the entity is found to be in noncompliance, the Secretary will publish the name of the health care entity in the Federal Register. In such case, the immunity protections provided under section 411(a) of the Act will not apply to the health care entity for professional review activities that occur during the 3-year period beginning 30 days after the date of publication of the entity's name in the Federal Register.

(2) Board of Medical Examiners. If, after notice of noncompliance and providing opportunity to correct noncompliance, the Secretary determines that a Board has failed to report information in accordance with paragraph (b) of this section, the Secretary will designate another qualified entity for the reporting of this information.

(Approved by the Office of Management and Budget under control number 0915-0126)

[54 FR 42730, Oct. 17, 1989, as amended at 59 FR 61555, Dec. 1, 1994]

45 C.F.R. § 60.10 Information which hospitals must request from the National Practitioner Data Bank.

(a) When information must be requested. Each hospital, either directly or through an authorized agent, must request information from the Data Bank concerning a physician, dentist or other health care practitioner as follows:

(1) At the time a physician, dentist or other health care practitioner applies for a position on its medical staff (courtesy or otherwise), or for clinical privileges at the hospital; and

(2) Every 2 years concerning any physician, dentist, or other health care practitioner who is on its medical staff (courtesy or otherwise), or has clinical privileges at the hospital.

(b) Failure to request information. Any hospital which does not request the information as required in paragraph (a) of this section is presumed to have knowledge of any information reported to the Data Bank concerning this physician, dentist or other health care practitioner.

(c) Reliance on the obtained information. Each hospital may rely upon the information provided by the Data Bank to the hospital. A hospital shall not be

held liable for this reliance unless the hospital has knowledge that the information provided was false.

(Approved by the Office of Management and Budget under control number 0915-0126)